

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

OAH Case No. 2011060490

S.G.,

Claimant,

v.

SOUTH CENTRAL LOS ANGELES
REGIONAL CENTER,

Service Agency.

DECISION

Daniel Juárez, Administrative Law Judge, Office of Administrative Hearings, heard this matter on August 17, 2011, in Los Angeles, California.

Claimant's father, J.L.G., represented S.G. (Claimant).¹

Johanna Arias-Bhatia, Fair Hearing/Government Affairs Manager, represented the South Central Los Angeles Regional Center (Service Agency).

The parties submitted the matter for decision on August 17, 2011.

STATEMENT OF THE CASE

Claimant contends he is eligible for services from the Service Agency as a person with a developmental disability.

The Service Agency contends Claimant has no developmental disability that would make him eligible under the pertinent statute.

¹ Initials identify Claimant and his father to preserve Claimant's confidentiality.

The parties focused their cases on the question of whether Claimant has mental retardation or autism.

FACTUAL FINDINGS

1. Claimant applied for services from the Service Agency on an undetermined date. The Service Agency denied Claimant eligibility on May 11, 2011. Claimant filed a request for hearing on June 9, 2011.

2(a). Claimant is a four-year-old boy who lives with his parents. The Service Agency's records describe Claimant based on Claimant's parents' (in particular his father's) descriptions.

2(b). Claimant is not toilet-trained. He is resistive to brushing his teeth. He cannot dress himself. He eats with a fork, but spills. He cannot drink from a cup; he drinks from a bottle or from a straw.

2(c). Claimant does not always maintain eye contact. He does not initiate friendships. He prefers to play alone. He does not pretend play with his toys.

2(d). Claimant has a hard time with transitions. Claimant has rigid routines when he arrives from school every day. He tantrums daily and bites and hits his parents. He has a hard time focusing on one thing and moves from one activity to another. He will focus for less than five minutes on a preferred activity. He engages in hand flapping and jumps up and down when excited. He lines up toy cars and other items and stacks toys and other things. He is sensitive to loud noises. Claimant has an extremely high pain threshold. He eats inedible objects, including grass and things not meant for human consumption, like birdseed. He is soothed by being in water.

2(e). Claimant has a five-word vocabulary. His speech is hard to understand. He primarily communicates using grunts and gestures. He does not engage in reciprocal conversation. He can only follow a one-step command. He cannot copy or trace letters. He cannot draw circles or use scissors. He does not know his shapes, colors, or numbers.

2(f). Despite all of these challenges, Claimant can use a computer well. He can operate a DVD player.

3. Claimant receives special education services through the Los Angeles Unified School District (LAUSD). In an individual education plan, dated June 10, 2011, LAUSD defined Claimant's disability, for schooling purposes, as "Developmentally Delayed." In a psychoeducational report, dated July 14, 2010, LAUSD administered, among other things, the Childhood Autism Rating Scale (CARS) and found that Claimant tested in the non-autistic range. This report, however, is given no weight, as the CARS test results page identified a child by another name. It is unknown if the report writer simply misnamed

Claimant or whether the test results belong to another child. With no evidence to clarify the error, the report is deemed unreliable.

4. Claimant receives mental health services through Children's Hospital Los Angeles, according to his father. The evidence failed to specify the type of mental health services Claimant is receiving.

5. Claimant was referred to the Service Agency by Kaiser Permanente Hospital (Kaiser). According to the Service Agency's records, Kaiser recently evaluated Claimant and concluded that he has autism. Neither party offered the Kaiser evaluation into evidence. No one from Kaiser testified. There were no letters from Kaiser evaluators opining as to Claimant's diagnosis.

6. Thomas L. Carrillo, Ph.D., a clinical psychologist in Whittier, California, evaluated Claimant on January 25, 2011, on behalf of the Service Agency. According to his testimony and written report, Carrillo attempted to "diagnose the presence or absence of developmental delays, which are attributable to mental retardation and/or an Autistic Spectrum Disorder." Carrillo observed Claimant, interviewed Claimant and his father, and administered a number of tests, including the Wechsler Preschool and Primary Scale of Intelligence—3rd Edition (WPPSI-3), the Leiter International Performance Scale—Revised (Leiter), the Vineland Adaptive Behavior Scales—Revised (Vineland), the Gilliam Autism Rating Scale—Second Edition (GARS), the CARS, and the Autism Diagnostic and Observation Schedule—Module 2 (ADOS).

7. On the WPPSI-3, Claimant scored a verbal intelligence quotient (IQ) composite score of 70, a performance IQ composite score of 93, and a processing speed IQ composite score of 91. Claimant's full-scale IQ composite score was 79. Carrillo estimated that Claimant's "performance on the WPPSI-3 is artificially depressed due to hearing deficits and related communication delays." Based on this, Carrillo opined that "[i]t is likely that he functions within the low normal to normal range."

8. Carrillo administered the Leiter to further assess Claimant's cognitive potential. Claimant scored a fluid reasoning IQ composite score of 84, a brief IQ composite score of 98, and a fundamental visualization IQ composite score of 100. Claimant's full-scale IQ composite score was 87.

9. With scores from the Leiter and WPPSI-3, Carrillo concluded that Claimant's "cognitive abilities are within the normal range and that he demonstrates significant delays in communication skills." Carrillo suspects that Claimant demonstrates difficulties in receptive and expressive language skills due to suspected hearing loss. Claimant had ear tubes inserted in February and April 2010, and noted that Claimant's hearing was questionable because the records indicated that Claimant failed to respond when spoken to at times.

10. Carrillo found that Claimant scored in the “mild range of delay on the various domains associated with the Vineland.” Claimant scored an adaptive behavior composite score of 55.

11. Due to Claimant’s hand flapping and other autistic-like behaviors, Carrillo administered the CARS, GARS, and ADOS. On the CARS, Claimant scored 26, a score Carrillo described as “within the non-autistic range of autism.” On the GARS, Claimant scored an autism quotient of 70, a score Carrillo described as “within the possible range of autism.” On the ADOS, Claimant scored a 2 in communication (a score of 5 or greater is required for an autism diagnosis) and he scored a 4 in reciprocal social interaction (a score of 6 or greater is required for an autism diagnosis); and he scored a 6 in combined categories (a score of 12 or greater is required for an autism diagnosis). Despite noting that Claimant displays behaviors seen in children with autism (such as hand flapping and finger flicking), according to these scores, Carrillo concluded that Claimant “does not meet the criteria for autism.”

12. Overall, Carrillo concluded that Claimant’s “autistic-like behaviors should be carefully monitored,” but reiterated that Claimant does not have autism. Carrillo diagnosed Claimant with “Mixed Receptive-Expressive Language Disorder.” Carrillo suggested that Claimant be re-evaluated in one year.

13. Neither party set forth the diagnostic criteria used to determine diagnoses. The Administrative Law Judge referred to the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition, Text Revision (DSM-IV-TR) to acquire the diagnostic criteria of autism and mental retardation. The DSM-IV-TR is published by the American Psychiatric Association. Based on the greater than six years experience as an Administrative Law Judge hearing these types of matters and the assertions of licensed psychologists and psychiatrists in numerous administrative hearings on regional center eligibility, including licensed psychologists from the Service Agency, the Administrative Law Judge officially notices the DSM-IV-TR and finds that its diagnostic criteria is universally accepted by psychologists and medical professionals in the United States. (See Govt. Code, § 11515; and Evid. Code, § 452, subd. (h).)

14. According to the DSM-IV-TR, a person has autism when s/he meets the following:

(A) A total of six (or more) items from (1), (2), and (3), with at least two from (1), and one each from (2) and (3):

(1) qualitative impairment in social interaction, as manifested by at least two of the following:

(a) marked impairment in the use of multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, and gestures to regulate social interaction

(b) failure to develop peer relationships appropriate to developmental level

(c) a lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., by a lack of showing, bringing, or pointing out objects of interest)

(d) lack of social or emotional reciprocity

(2) qualitative impairments in communication as manifested by at least one of the following:

(a) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime)

(b) in individuals with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others

(c) stereotyped and repetitive use of language or idiosyncratic language

(d) lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level

(3) restricted repetitive and stereotyped patterns of behavior, interests, and activities, as manifested by at least one of the following:

(a) encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus

(b) apparently inflexible adherence to specific, nonfunctional routines or rituals

(c) stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements)

(d) persistent preoccupation with parts of objects

(B) Delays or abnormal functioning in at least one of the following areas, with onset prior to age 3 years: (1) social interaction, (2) language as used in social communication, or (3) symbolic or imaginative play.

(C) The disturbance is not better accounted for by Rhett's Disorder or Childhood Disintegrative Disorder.

15. According to the DSM-IV-TR, "[t]he essential feature of Mental Retardation is significantly subaverage general intellectual functioning . . . that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety The onset must occur before age 18 years General intellectual functioning is defined by the intelligence quotient (IQ or IQ-equivalent) obtained by assessment Significantly subaverage intellectual functioning is defined as an IQ of about 70 or below It should be noted that there is a measurement error of approximately 5 points in assessing IQ, although this may vary from instrument to instrument Thus it is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior."

LEGAL CONCLUSIONS

1. As Claimant seeks initial eligibility, Claimant bears the burden of proof. The standard of proof is a preponderance of the evidence.

2. Welfare and Institutions Code section 4512 states:

(a) "Developmental disability" means a disability that originates before an individual attains age 18 years, continues, or can be expected to continue, indefinitely, and constitutes a substantial disability for that individual. As defined by the Director of Developmental Services, in consultation with the Superintendent of Public Instruction, this term shall include mental retardation, cerebral palsy, epilepsy, and autism. This term shall also include disabling conditions found to be closely related to mental retardation or to require treatment similar to that required for individuals with mental retardation, but shall not include other handicapping conditions that are solely physical in nature.

3. California Code of Regulations, title 17, section 54001 states in pertinent part:

(a) "Substantial disability" means:

(1) A condition which results in major impairment of cognitive and/or social functioning, representing sufficient impairment to require interdisciplinary planning and coordination of special or generic services to assist the individual in achieving maximum potential; and

(2) The existence of significant functional limitations, as determined by the regional center, in three or more of the following areas of major life activity, as appropriate to the person's age:

- (A) Receptive and expressive language;
- (B) Learning;
- (C) Self-care;
- (D) Mobility;
- (E) Self-direction;
- (F) Capacity for independent living;
- (G) Economic self-sufficiency.

(b) The assessment of substantial disability shall be made by a group of Regional Center professionals of differing disciplines and shall include consideration of similar qualification appraisals performed by other interdisciplinary bodies of the Department serving the potential client. The group shall include as a minimum a program coordinator, a physician, and a psychologist.

(c) The Regional Center professional group shall consult the potential client, parent . . . educators, advocates, and other client representatives to the extent that they are willing and available to participate in its deliberations and to the extent that the appropriate consent is obtained.

4. Some of Claimant's skill deficits may be age-related; however, Claimant has a disability. Further, he is substantially disabled, pursuant to the applicable regulations. In accordance with Carrillo's diagnosis, Claimant has a significant functional limitation in his receptive and expressive language. By requiring special education services, he has a significant functional limitation in learning. Pursuant to his father's undisputed description of Claimant, Claimant has significant functional limitations in self-care and self-direction, as appropriate to his age. With functional limitations in more than three areas, Claimant is substantially disabled by his condition. (Cal. Code Regs., tit. 17, § 54001.)

5(a). Despite being substantially disabled, however, to be considered to have a developmental disability, Claimant must nonetheless have mental retardation, cerebral palsy, epilepsy, autism, or a condition found to be closely related to mental retardation or to require treatment similar to persons with mental retardation. (Welf. & Inst. Code, § 4512, subd. (a).)

5(b). Claimant's cognitive levels, as tested by Carrillo, did not show that he has mental retardation. Carrillo's testing also did not find that Claimant has autism, despite having some autistic-like behaviors. The parties provided no evidence from Kaiser showing how its clinical staff diagnosed Claimant with autism. Overall, and considering in particular the ADOS scores, the evidence did not establish that Claimant has autism. There was no evidence that Claimant has cerebral palsy or epilepsy.

5(c). There was insufficient evidence that Claimant has a condition found to be closely related to mental retardation or to require treatment similar to persons with mental retardation.

6. While the record in this matter is insufficient to conclude he has a developmental disability, given Claimant's undisputed disabling condition and Carrillo's suggestion that Claimant be reevaluated in one year, Claimant could gather additional evidence and reapply to the Service Agency. That is, this Decision is without prejudice. Nevertheless, on this record, the evidence did not establish that Claimant has a developmental disability, as defined in Welfare and Institutions Code section 4512, subdivision (a). It is therefore necessary to deny Claimant's appeal.

7. Cause exists to deny Claimant's appeal, as set forth in Factual Findings 1-15, and Legal Conclusions 1-6.

ORDER

Claimant's appeal is denied in case number 2011060490.

Dated: August 29, 2011

DANIEL JUAREZ
Administrative Law Judge
Office of Administrative Hearings

NOTICE

This is the final administrative decision. This Decision binds both parties. Either party may appeal this Decision to a court of competent jurisdiction within 90 days.